No. 439

Supreme Court of the United States

October Term, 1958

JACKSON D. MAGENAU, Administrator of the Estate of Norman Ormsbee, Jr., deceased,

Petitioner,

vs.

AETNA FREIGHT LINES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the Petition for Writ of Certiorari presented by Petitioner to review a judgment of the United States Court of Appeals for the Third Circuit which reversed a judgment of the United States District Court for the Western District of Pennsylvania be denied.

Opinions Below

The opinion of the District Court (R. 207a-225a) is reported at 161 F. Supp. 875. The opinion of the Court of Appeals is reported at 257 Fed. Rep. 2d 445.

Jurisdiction

The judgment of the Court of Appeals was entered on July 17, 1958 (Petitioner's App. p. v). A petition for re-

hearing was denied on August 14, 1958. Petition for Writ of Certiorari was filed on October 13, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Question Involved

Should the holding of the Court of Appeals that the jury's answer to the Special Interrogatory in favor of the Petitioner barred recovery in the Federal Court action, be reviewed by this Court on certiorari?

Constitutional Provision and Statutes Involved

The Constitutional provision involved is the Seventh Amendment to the United States Constitution. The statutes involved are in Pennsylvania Workmen's Compensation Act, Sections 104 and 203 (77 Purdon's Pa. Stat. Ann. Secs. 22, 52). The text of those provisions is set forth in Petitioner's Appendix at pages vi and vii.

Statement

This was a negligence action brought in the Federal District Court on the basis of diversity jurisdiction. Petitioner, as administrator of the Estate of Norman Ormsbee, Jr., brought suit against Respondent alleging that the latter was responsible for the death of said decedent because of an accident which occurred on March 20, 1956 near Rochester, Pennsylvania.

Prior to that date, one Daniel Fidler, owner of the tractor-trailer had leased the equipment to Respondent for use in its regular business of transporting freight under a permit from the Interstate Commerce Commission. On or about March 13, 1956, Respondent's driver, Charles Schroyer, picked up a load of steel at Syracuse, New York, which

load was consigned to Crucible Steel Corp., at Midland, Pennsylvania. While enroute from Syracuse to Buffalo, Schroyer encountered tire trouble and also had had brake difficulty, which Respondent's superintendent at Buffalo had endeavored to adjust.

On the afternoon of March 20, 1956, Respondent's driver stopped at Jones' Tavern at Waterford, Erie County, Pennsylvania. There he talked to the tavern owner to whom he complained that he was having trouble with the brakes. A few minutes later, Petitioner's decedent and Herbert Brown entered the tavern. Schroyer offered Brown $25 if Brown would accompany him on the remainder of the trip to Midland stating that he, Schroyer, was afraid he was going to run into trouble. Brown declined the offer. Schroyer thereupon asked Petitioner's decedent to go on the trip for $25.00, stating that he was having trouble with the brakes on the tractor and also on the trailer. Petitioner's decedent accepted the offer and the two got into the tractor. This was the last that they were seen alive. Later that evening, the Pennsylvania state police received a call and in response thereto found the tractor-trailer over an embankment along the highway about four and one-half miles east of Rochester, Pennsylvania, and both men dead.

Petitioner's entire theory throughout the trial was to prove the facts set forth above surrounding the circumstances under which Petitioner's decedent came to be on the tractor. Petitioner asked the Trial Judge to charge on these facts which Petitioner presented and to further charge that if the jury accepted Petitioner's testimony, then the jury could find that an emergency arose which necessitated Respondent's driver in engaging Petitioner's decedent to accompany him for the remainder of the trip to protect Respondent's interests. This the Trial Judge did

(R. 184a). In addition, the Trial Judge submitted special interrogatories, the first of which was exactly in accordance with Petitioner's theory as set forth immediately above. The jury answered this special interrogatory, saying, as Petitioner's theory was, that such an emergency had arisen and that the situation necessitated Respondent's driver in engaging Petitioner's decedent. The jury returned a verdict for Petitioner which the Trial Court refused to set aside. On appeal to the United States Court of Appeals for the Third Circuit, the Court, by Circuit Judge Goodrich, held that the special interrogatory was clear, and that the jury's answer thereto was clear and that such determination constituted Petitioner's decedent an employee under the substantive law of Pennsylvania. Therefore, the Court of Appeals held that under the jury's determination, Petitioner's sole remedy against Respondent was under the Pennsylvania Workmen's Compensation Act. The Petition for Writ of Certiorari seeks review of this decision.

Reasons Why the Writ Should be Denied

Petitioner's entire position throughout the trial of this case was that the presence of Petitioner's decedent in Respondent's tractor was necessitated by an emergency situation which arose during the operation, by Respondent's driver, of the tractor-trailer. The record establishes this beyond all doubt and establishes that it was Petitioner who brought in the evidence of emergency; who brought in evidence of the payment of money to Petitioner's decedent; who argued that such evidence proved "employment" of Petitioner's decedent; and who presented that theory to the Trial Judge for charge.

The undisputed factual situation left Petitioner no alternative. Petitioner was well aware that not only Respond-

ent's Company rules and regulations but also the regulations of the Interstate Commerce Commission, which governed operations of Respondent's trucking equipment, forbade "riders" on such equipment. Petitioner also knew that under established Pennsylvania law, if Respondent's driver did permit a "rider" on the truck, such rider had the status of a trespasser as to Respondent, the only named defendant.

It was solely to escape the holding that Petitioner's decedent would be a trespasser as to Respondent that Petitioner sought to establish (and did establish to the jury's satisfaction) an emergency giving rise to an implied right in Respondent's driver to hire Petitioner's decedent in furtherance of Respondent's interests. There was no middle ground. If Petitioner's decedent were not a mere "rider" (therefore a trespasser as to Respondent), he had to be on the truck as an emergency employee of Respondent. Otherwise, as Judge Goodrich, speaking for the Court of Appeals, said in his opinion, 257 F. 2d 448: "If that was not what he was doing, he had no business riding with Schroyer at all."

Respondent did not raise the defense of emergency; did not present the testimony of an emergency; did not present the testimony relative to "employment". Here is the record:

1. Petitioner's first witness, after two state police officers had testified as to what they found at the scene of the accident, was Herbert L. Brown. It was Brown's direct examination that first brought into the case the circumstances surrounding Ormsbee's being on the tractor. *Petitioner* proved through Brown that Respondent's driver stated in the Tavern that he had been having trouble with the truck. Petitioner proved through Brown that Respond-

ent's driver offered $25.00 to Brown to go along on the remainder of the trip. Petitioner's purpose in asking for this testimony is clearly set forth at R. 36a where, when Respondent's counsel objected to this hearsay testimony, Petitioner's counsel stated in open court:

> "Your Honor, we frame this question in this manner *to show the intent, purpose and motive of Mr. Schroyer in offering employment to this man.* We realize it is hearsay, but it comes in under the—first of all, under the testimony of the man acting in the course of his employment, secondly under the *res gestae*, and thirdly, to show the intent, purpose and motive."

As shown, Petitioner produced this evidence to prove the employment of Petitioner's decedent by Respondent's driver.

2. Petitioner's witness who immediately followed Brown was Charles Jones, the owner of Jones' Tavern, where the offer of employment by Schroyer to Ormsbee took place and where that offer was accepted. Jones, on Petitioner's direct examination, proved that such an offer of $25 was made by Respondent's driver to Petitioner's decedent and that it was accepted, and that the reason for the offer was that the driver was having trouble with the "brakes on the tractor, also the trailer" (R. 48a).

3. With respect to the testimony of these two Petitioner witnesses, Respondent, on cross examination, constantly sought to prove that if such an offer was made by Respondent's driver, it was only because said driver wanted to prove how much money he made on a trip. Petitioner's witnesses clearly refuted this theory of Respondent.

4. Petitioner proved the complaints of Respondent's driver concerning brake trouble, by his next witness, the Respondent's own Buffalo terminal superintendent. Thus, Petitioner continued to prove emergency which caused the employment of Ormsbee.

5. At the conclusion of Petitioner's case, Respondent moved for a compulsory nonsuit on the ground that Petitioner had not proven that Ormsbee was on the truck for any purpose of Respondent. Petitioner's counsel stated (R. 114a):

> "The question is whether *our* evidence in this case develops an unforeseen contingency or an emergency arising.
>
> * * *
>
> I think it is a legitimate inference, in view of the trouble he was having, he was fearful he was going to break down on the road, he needed somebody to give him help at that particular point."
>
> (R. 115a)
>
> "(Ormsbee was) To help in the case of a breakdown."
>
> (R. 116a)
>
> "You can understand for instance suppose the thing is wrecked, you have got a valuable load laying around a field in a storm, something like that, certainly a servant would have authority to engage a helper to help him protect, cover up with a tarpaulin.
>
> * * *
>
> I think he (Schroyer) foresees that he is going to have a breakdown on the road, he wants somebody along to accompany him in that thing that appears certain in the light of what's been going on in the past."
>
> (R. 117a)
>
> "I think the jury can infer what he wants the farmer to do is go out and help with the cargo. I think in this case the jury can infer he (Schroyer) wants help in case of a breakdown."

6. At the conclusion of all the evidence by both sides, certain requests for instructions to the jury were sub-

mitted to the Trial Judge. In a conference in Chambers, the Court discussed these with counsel for both sides. *Petitioner's* very first request for instructions was:

> "An agent has implied authority to *employ* an assistant where an unforeseen contingency arises making it impracticable to communicate with the agent's principal, and making the appointment of an assistant reasonably necessary for the protection of the interests of the principal entrusted to the agent, and if you find such to be the fact in this case, then Norman Ormsbee, Jr. would not be a trespasser upon defendant's vehicle."

This request was based almost verbatim on the language of the Pennsylvania Supreme Court in *Jaeger v. Sidewater*, 366 Pa. 481, 77 A. 2d 434. Here again *Petitioner* was pursuing its constant course, held throughout the trial, that Petitioner's decedent was brought upon the tractor-trailer of Respondent through the implied authority to employ a helper vested in Respondent's driver under Pennsylvania law. This request the Court affirmed and read it to the jury as a correct statement (R. 189a).

7. The Court's charge also instructed the jury on Petitioner's theory of the case. At R. 183a and R. 184a the Court instructed the jury:

> "Now as related to negligence, the Aetna Freight Lines, the defendant in this case, would not be responsible for want of care, for negligence, unless the decedent Mr. Ormsbee was in that truck with its permission, by its consent express or implied, and the law is that the driver can't give the consent, except in this case of emergency, and that is why this testimony brought out *on the part of the plaintiff* to indicate there was such an emergency there that authorized, they (Petitioner) think under the law, that would permit Mr. Schroyer to invite Mr. Ormsbee to complete the trip with him, but unless you find in this case that an emergency arose and it was such an emergency that Mr. Schroyer was unable to perform it

alone, that is his duties for the continuance of the trip, because of what has been brought out here, if you accept the proposition that the brakes were bad, and if that was the type of emergency then he would be privileged to take on this *assistant* Mr. Ormsbee.

* * *

It is a rule universally recognized that the relation of master and servant cannot be imposed upon a person without his consent, express or implied. It is upon the exception to this general rule which is quite as well settled as the general rule itself, *that the plaintiff relies in this case to establish the relation of master and servant under this evidence.* The exception is that a servant may engage an assistant in the case of emergency where he is unable to perform the work alone, but you have to find an emergency on the road confronting Schroyer that night that he couldn't go alone, it was reasonable in his opinion, and it was to be expected *in the interests of the employer* (Respondent) that he had the implied power, he did have the power to engage an assistant, and engaged Mr. Ormsbee to go along with him to complete the trip."

That portion of the charge laid down as factually, as emphatically and as clearly as possible the Petitioner's theory in this case.

8. Petitioner's theory was then presented to the jury in the form of a Special Interrogatory which read (R. 184a-185a):

"Under the evidence in this case do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee to accompany him for the remainder of the trip?"

It should be again noted that the only evidence of an unforeseen contingency (an emergency) was that presented by *Petitioner.*

It should also be noted that the Court's reading, in its charge, of this first Special Interrogatory to the jury immediately followed the quotation from the charge under point 7 immediately above, where the Court had discussed implied authority to establish the relation of master and servant. It is of extreme interest to note that after the Court read this Special Interrogatory to the jury (R. 185a), he then said:

> "and the words there 'unforeseen contingency' mean the emergency I have just mentioned, the inability of Mr. Schroyer to cope with it alone. *If you think it reasonable that he (Schroyer) engage an assistant, why then you may answer that Interrogatory Number 1, you* may answer that in the affirmative."

With these clear instructions as to the creation of the master and servant relationship under the evidence in the case, and with this clearly worded Special Interrogatory before it, the *jury* answered "Yes" to it, thus finding that the master-servant relationship had been established by Petitioner.

It is therefore readily apparent that Petitioner's evidence and Petitioner's theory based on that evidence was submitted to the jury. The jury found that Petitioner's theory was correct. Yet, with all of the above in mind and firmly appearing in this record, Petitioner claims that he was denied a jury trial under the Seventh Amendment of the Constitution and under the authority of *Byrd v. Blue Ridge Rural Electric Corporation, Inc.*, 356 U. S. 525.

In the *Byrd case, supra*, a negligence action was brought in the District Court for the Western District of South Carolina, on the basis of diversity of citizenship. The Respondent in that case raised the affirmative defense that the Petitioner's only remedy against that Respondent was under the South Carolina Workmen's Compensation Act.

Petitioner did not, in any part of his case, introduce testimony attempting to rebut the affirmative defense. To have done so would have been anticipating a defense and undoubtedly would have been stopped by the Trial Judge. The Respondent, in its case, introduced evidence bearing on the affirmative defense. At the conclusion of the entire case, Petitioner moved the Court to strike the affirmative defense as not having been established under the law of South Carolina. This motion the Trial Court granted. Petitioner therefore did not introduce any rebuttal evidence to contradict the Respondent's evidence bearing on the affirmative defense. There was no need to—Petitioner's motion had been granted and the affirmative defense had been stricken. Petitioner then received a verdict from the jury. After motion for new trial and judgment *n. o. v.* were refused, Respondent appealed to the Court of Appeals which, upon making an independent examination of Respondent's evidence bearing on the affirmative defense, reversed, and held that, as a matter of law, under appellate decisions of the South Carolina Supreme Court, the affirmative defense had been established, and that Petitioner could not recover except under the South Carolina Workmen's Compensation Act. Upon certiorari being granted by this Court, it was held that a new trial was required because Petitioner had not been afforded an opportunity to rebut Respondent's evidence bearing on the affirmative defense and, then, the jury should decide the ultimate factual matters bearing thereon.

This Court also discussed the question of whether the practice in South Carolina, approved by the South Carolina Supreme Court, of having the courts of that state decide the factual issues of immunity without the aid of juries was binding upon Federal Courts to whom a like

immunity question came. This Court said that the federal system of separation of court from jury in deciding such factual questions would take precedence over the South Carolina practice. Because of that discussion, Petitioner here says that the jury was never permitted to decide the factual issue bearing on the status of Ormsbee. That is not so.

Respondent in this case did not raise the employment question and its consequences as an affirmative defense. Respondent's Answer to the Complaint (R. 9a and 10a) clearly shows that. Respondent did not introduce the question of emergency, of hiring, or of employment in the trial of the case—Petitioner did. Petitioner's evidence and Petitioner's theory of emergency plus hiring was presented to the jury in clear language by the Court's charge and by the use of Special Interrogatory Number 1. The jury found in favor of Petitioner's theory by its affirmative answer thereto.

Nor did the Court of Appeals for the Third Circuit make an independent examination of the record to see if the jury had properly decided the factual question concerning the status of Petitioner's decedent. Judge Goodrich, after discussing the Pennsylvania cases and 1 Restatement, Agency, 2d, Sec. 242, com. b (Tent. Draft No. 4, 1956) bearing on the question of implied right of an agent to appoint another agent for the principal, said, 257 F. 2d 447:

> "Thus the matter turns in the final analysis on a question of fact, that is, a sufficient state of emergency to justify the enlisting of another to help assist in the business to be done.
>
> "The *jury's* finding is a forthright answer to a forthright question. The trial judge who heard all the testimony was satisfied with it. We do not think on this state of the record that we would be justified in setting it aside."

Applying that factual determination by the jury to the law of Pennsylvania, as announced by the Pennsylvania Supreme Court in *Persing v. Citizens' Traction Co.*, (1928) 294 Pa. 230, 144 Atl. 97, the Court of Appeals held that Petitioner's remedy was under the Pennsylvania Compensation Act. This in no way constituted a review of the testimony in order to decide the factual question contrary to the jury's finding. The Court accepted the jury's determination. The jury, not the Court of Appeals, determined Ormsbee's status. Petitioner says at page 20 of its Petition for the Writ that "the Court of Appeals did not consider whether there was any reasonable basis for a jury determination in favor of Petitioner on this point (status), because the Court simply followed State practice reserving the issue to the Court". That is exactly contrary to what Judge Goodrich decided and what he said. He and the other two eminent Judges of the Court of Appeals, Maris, J. and Hastie, J., specifically accepted the jury's determination of Ormsbee's status. They didn't examine the record to see if there was any reasonable inference to support the jury's answer to the Special Interrogatory because *they adopted it.* What more could Petitioner ask?

Petitioner also contends that the Court of Appeals had no power to apply the Pennsylvania cases, and in particular *Persing v. Citizens' Traction Co., supra,* to the jury's factual determination. In particular, Petitioner claims that the question of whether Ormsbee was employed in the regular course of Respondent's business was for the jury. But, there was absolutely no dispute in this entire record on this point. Petitioner's own counsel stated (R. 114a) that the jury could infer that Respondent's driver, in the course of continuing his journey of delivering the

load of steel (certainly Respondent's regular business), was fearful of breaking down on the road and that he would need help at that particular point. Again at R. 115a, Petitioner's counsel flatly stated that Ormsbee was "to help in case of a breakdown". All of this Petitioner related to Respondent's business of transportation of goods and protection thereof in the event of breakdown of the delivery equipment. Judge Goodrich, at 257 F. 2d, 448, said it better than we can:

> "We cannot escape the conclusion that the finding that authorized the hiring of Ormsbee put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all."

In doing so, the Court of Appeals followed Pennsylvania law, and as the Court has said, "We ordinarily accept the determination of local law by the Court of Appeals." *Woods v. Interstate Realty Co.*, (1949) 337 U. S., 530.

Petitioner's position in this matter, as presented in its Petition to this Court, is extremely anomalous. Petitioner presented the status of Ormsbee to the jury. Petitioner was satisfied with the jury's determination. Petitioner was satisfied with the Trial Court's handling of the matter on the Motions for New Trial and Judgment *N. O. V.* Petitioner became dissatisfied when the Court of Appeals accepted the jury's determination and applied the Pennsylvania law. After the Court of Appeals handed down its decision, Petitioner sought rehearing on the sole ground that only the Workmen's Compensation Bureau of Pennsylvania had the power to determine the question of Ormsbee's status after the jury had already passed upon the factual issues as Petitioner had presented them. Now, Petitioner says the Court of Appeals had no power to ap-

ply Pennsylvania substantive law to the jury's determination, but that the jury should act on questions of law. We ask—just what power, under the Petitioner's theory, does the Court of Appeals have? Also, just what power does the Federal District Court have? Petitioner says that they have none—that the jury alone decides questions of fact and interprets the law. This is an amazing departure from the settled (certainly ever since common law and common law trial by jury was brought to this country) position and authority of judges. But *Byrd, supra*, calls for no such abandonment of the function of judges to a jury. *Byrd* merely teaches that even though state court practice may be that the Court, not the jury, can examine the disputed evidence and decide an issue under the law, such does not pertain in the Federal Court system. Here, even if Pennsylvania state court practice were to that same effect, this Trial Court and this Court of Appeals did not take the question from the jury. They took the jury's determination of the factual issue and applied the law. We know of no case that has ever held that such is not the function of the Court.

Even in the field of Federal Employer Liability Cases, this Court has specifically and very recently recognized the right of the Federal Trial Court or the Court of Appeals to examine the evidence in the record to determine, as a matter of law, whether any evidence of, or even any inference of, negligence on the part of a defendant existed. If not, this Court agreed that the Trial Court or the Court of Appeals could enter a directed verdict for the defendant. Such procedure didn't deprive a plaintiff of a jury determination of his case. *Herdman v. Pennsylvania Railroad Co.*, (1957) 352 U. S. 518. *A fortiori*, if a plaintiff's case is tried on a theory of master-servant relationship, and it is submitted to jury on that basis, and the jury finds such a

relationship, and the substantive law of a state then holds that the remedy is not under common law but under a state statute, there has been no denial of jury trial—on the contrary, full jury trial was had!

Lastly, Petitioner contends that Respondent failed to call the Trial Judge's attention to an omission in the charge, and that therefore Respondent cannot later complain and contest the jury's verdict. But the Trial Judge did not, in this case, omit anything relative to the determination of the factual issue of status of Ormsbee in his charge to the jury. If it need be said again after all the times we have said it heretofore, Respondent was not the one who raised the issue of Ormsbee's status. Petitioner did. Petitioner set out to prove and did prove to the jury's satisfaction that Ormsbee was hired by Respondent's driver while the latter was within the scope of his employment. If not, then all of the testimony adduced by Petitioner relative to Schroyer's statements at Jones' Tavern on March 22, 1956, was clearly inadmissible as the rankest of hearsay and not admissible against Respondent, the only defendant, unless the agent (Schroyer) was within the scope of his employment, as Respondent's employee, at the time. As a matter of fact, that was the reason that Petitioner's counsel advanced to get such hearsay into this record. See R. 36a. Respondent tried to keep this hearsay evidence out. Petitioner fought for it and got it in. Petitioner's own case raised the issue of employment. This was not by happenstance but by design, as we have shown above. If Petitioner felt that additional instructions were necessary to clarify exactly what Petitioner was trying to prove, Petitioner could have, and should have, requested such additional instructions and additional Special Interrogatories. We can see that if Respondent had been the one to introduce the status question in this record,

and if Respondent had been the one proving the emergency and the hiring of Ormsbee, Respondent may have been required to ask the Court for additional instructions. But, Respondent was not proving the point here. Petitioner was. Petitioner proved the existence of an emergency. Petitioner proved the offer and acceptance of compensation. Petitioner proved that the length of employment was casual—in this case, for the balance of one trip. Petitioner proved that all this took place in the regular business of Respondent, the transportation of goods by truck.

In short, the Petitioner proved in his own case that there could be no other result than that reached by the able Court of Appeals. Yes, litigation must at some time end. Petitioner is not entitled to a new trial nor to reinstatement of his verdict when he sought such verdict on his own theory and his own theory prevailed with the jury. If, because Petitioner's theory did prevail, the substantive law of Pennsylvania holds that he is out of Court, he should not be permitted to alter his theory and seek another trial at the hands of another jury. Such truly would be a mockery of judicial administration.

CONCLUSION

For the foregoing reasons, the Respondent prays that the Writ of Certiorari be denied.

Respectfully submitted,

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